

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

77-4083

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
THE LONG ISLAND COLLEGE HOSPITAL,

Petitioner,

-against-

77-4083

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL 144, HOTEL, HOSPITAL NURSING HOME
AND ALLIED SERVICES UNION, SEIU, AFL-CIO,

Respondent-Intervenor.
-----X

BRIEF FOR RESPONDENT-INTERVENOR

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BRIEF FOR RESPONDENT-INTERVENOR

PRELIMINARY STATEMENT

The petition of the Long Island College Hospital ("Petitioner" or the "Hospital") filed pursuant to section 10(f) of the Act, 29 U.S.C. §160(f), asks this Court to review and set aside an order of the National Labor Relations Board ("Board") dated February 9, 1977 (228 NLRB No. 13) that directed the Hospital to bargain with Local 144 Hotel, Hospital, Nursing Home & Allied Services Union, Service Employees International Union, AFL-CIO ("Union") (521-22)*

* Numbers in parentheses refer to pages of the Joint Appendix.

as the exclusive bargaining agent of a bargaining unit consisting of the Hospital's maintenance employees. The Board has cross-petitioned to enforce its order and the Union by order of this Court dated June 23, 1977 was granted leave to intervene.

THE FACTUAL BACKGROUND

Long Island College Hospital is a New York Corporation, engaged in the operation of a non-profit hospital, and an employer within the meaning of the National Labor Relations Act ("Act"). For thirteen long years the Hospital has refused to bargain with Local 144, the duly certified bargaining representative of the Petitioner's maintenance and engineering department employees.

This controversy began when the New York State Labor Relations Board ("SLRB") issued a Decision, Order and Direction of Elections on July 6, 1964 (27 N.Y. SLRB 405 (1964)). Hearings had been held by the SLRB which considered the appropriateness of the bargaining unit sought by the Union. The SLRB weighed the traditional factors used in making such determinations against its own policy opposing "over compartmentalization of hospitals into numerous small bargaining units" and found these factors to be evenly balanced. 27 N.Y. SLRB at 411. It therefore ordered that an election be held.

In the election held July 22, 1964 the employees in

in the maintenance and engineering department voted for separate representation and chose the Union as their bargaining agent. On December 28, 1964, after due consideration of the Hospital's objections, the SLRB certified the Union as the exclusive bargaining representative of the following unit:

All full-time and regular part-time employees in the maintenance of plant and engineering department, excluding chief engineers, assistant chief engineers, clerk and maintenance supervisor, [and all supervisors as defined by Section 2(ii) of the Act].

The Hospital responded by refusing to bargain with the Union contending, among other things, that the unit was inappropriate.

At this point, the Union, precluded by law from striking, attempted to invoke Section 716 of the State Labor Relations Act, which provided for mediation, factfinding and binding arbitration of "disputes" between non-profit hospitals and unions. However, on November 7, 1968, the New York Court of Appeals, in College Hospital v. Catherwood, 23 N.Y. 20, (1968) (College Hospital, No. I) upheld Petitioner's contention that resort to Section 716 was inappropriate, concluding that "disputes" under that section did not include representation issues. It found that the Union should have followed the "traditional procedure" by filing an unfair labor practice charge against the Hospital for its refusal to bargain collectively with a certified bargaining representative.

This, the court found, would enable the Hospital to challenge an unfair labor practice finding as well as the SLRB certification of the Union as bargaining agent for its maintenance employees. The Union's appeal was dismissed. Ottley, et al, of Local 144, Hospital & Allied Service Employees International Union, AFL-CIO v. Long Island College Hospital, 394 U.S. 716, (1969).

The Hospital, on May 13, 1969, then moved before the SLRB to vacate the certification as stale and unenforceable due to the passage of time and changes in the composition of the unit. The SLRB denied this motion.

The Union, on May 7, 1969, following the course suggested by the Court of Appeals, filed an unfair labor practice charge against Petitioner alleging a refusal to bargain collectively in violation of the State Labor Relations Act. Following an investigation, a complaint was issued. The New York Court of Appeals summed up the subsequent SLRB proceedings on this complaint in their opinion in College Hospital v. N.Y. Labor Board, 32 N.Y. 2d 314, (1973) "College Hospital No. II"):

"At the [SLRB] hearing which followed, the hospital not only attacked the board's original certification order of 1964, determining that the skilled maintenance workers constituted an appropriate bargaining unit, but interposed new matters including among other things, alleged improprieties in the conduct of the election. After thorough consideration of these issues, the board adhered to its earlier decision and entered an order, dated June 30, 1971, which

directed the hospital to cease and desist from refusing to bargain with Local 144 and extended its certification for one year from the date of its order or from the completion of any judicial review of that order."

The Hospital, notwithstanding the SLRB's order, refused once again to bargain collectively with the Union and again appealed. The Appellate Division of the New York Supreme Court, 39 A.D.2d 913 (1972), while upholding the SLRB's unit determination and its use of the self-determination election procedure, annulled the SLRB order and directed a new election based on the Hospital's objections to the conduct of the election. However, the Court of Appeals in College Hospital No. II, supra, reversed, finding:

The Appellate Division was eminently correct insofar as it affirmed the board's determination that the hospital's skilled maintenance employees constituted an appropriate bargaining unit.... Accordingly, the board's practice, resulting in the establishment of a separate bargaining unit of skilled maintenance employees, seems eminently proper and, certainly, may not be stamped as either arbitrary or capricious. Nor, in our view is there any valid basis for the hospital's attack on the conduct of the election.... (32 NY2d 314, at 321 and 323)

The SLRB order was then reinstated and enforced and the Hospital's petition for a Writ of Certiorari was denied by the United States Supreme Court on March 4, 1974 (415 U.S. 957.)

Thus, after nearly ten years of refusing to bargain, the Hospital was finally forced to commence "negotiations" with the Union and proceeded to go through the motions from March,

1974 to August 1975. However, the Hospital made it plain that it did not want its "attendance at those sessions to prejudice our position that the maintenance and engineering department was and is not an appropriate bargaining unit..." (Tr. 295-296) and immediately upon learning of a decision by the Regional Director of Region 2 not to issue a complaint in a vaguely analagous case the Hospital broke off "negotiations" with the Union.

On August 25, 1974, while the above negotiations were still proceeding, the hospital amendments to the NLRA became effective. (Public Law 93-360). These amendments not only gave the NLRB jurisdiction over hospitals such as Petitioner's, but also pre-empted all state action in this area. See State of N.Y. v. Local 144, 410 F. Supp 225 (S.D.N.Y.) aff'd F2d (2nd Cir. 1976). Accordingly, the Union wearily filed yet another unfair labor practice charge with the NLRB based on the Petitioner's continued, stubborn refusal to bargain collectively.

A complaint was issued by the Regional Director of Region 29 of the NLRB on December 31, 1975.

THE NLRB PROCEEDINGS AND
THE DECISION OF THE BOARD

A hearing was held before Administrative Law Judge Michael O. Miller ("ALJ") who in his June 4, 1976 Decision,

concluded:

As neither the lapse of time nor the aforementioned changes present special circumstances sufficient to warrant relitigation of the unit issues as determined by the SLRB, and as neither the New York Statute nor the SLRB Decision and Direction of Election provide a basis for the denial of comity, it is appropriate, under established Board precedent, that comity be given to the SLRB determination. Accordingly, I find that the employees in Respondent's maintenance of plant and engineering department constitute a unit appropriate for the purposes of collective bargaining. I conclude that by breaking off negotiations with the Union in mid-August 1975, because it believed that unit to be inappropriate for collective bargaining purposes, Respondent has failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) of the Act. (496)

Based on these conclusions the ALJ recommended that the Long Island College Hospital be ordered to cease and desist from refusing to bargain collectively with the Union as the exclusive bargaining representative for the employees in the maintenance of plant and engineering department, to cease and desist from any other unlawful interference, restraint or coercion of its employees' and to take certain affirmative actions to effectuate the policies of the Act including bargaining, upon request, with the Union.

The Board, having delegated its authority to a panel of three of its members pursuant to Section 3(D) of the Act, "considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings and conclusions of the Administrative Law Judge and

to adopt his recommended order."- Long Island College Hospital, 228 NLRB No. 13 (1977). The Board noted that this decision is in conflict with "the views expressed by the Court of Appeals for the Third Circuit in its opinion in Memorial Hospital of Roxborough v. NLRB" 545 F.2d 351 (1976), but chose to "adhere to the Board's majority decision in that case, reported at 220 NLRB No. 73 (1975), until such time as the Supreme Court shall have passed on the matter." (521) The Board's majority opinion in Memorial Hospital of Roxborough, supra, granting comity to a Pennsylvania SLRB certification involving a bargaining unit similar to the one at issue here stated:

We will recognize the results of an election conducted by a responsible state agency, and therefore extend comity to a certification issued pursuant to such an election, where the state agency's election procedures conform to due-process requirements and effectuate the policies of the Act. Bluefield Produce & Provision Co., 117 NLRB 1660, 40 LRRM 1065 (1957); The West Indian Co. Ltd.; 129 NLRB 1203, 47 LRRM 1146 (1961); Screen Print Corp., 151 NLRB 1266, 58 LRRM 1641 (1965).

As to the employers right to relitigate unit issues the Board noted that:

"In the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) of the Act is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 (1941); Rules and Regulations of the Board, §§102.67(f), 102.69(c). (Memorial Hospital of Roxborough, 220 NLRB No. 73, 90 LRRM 1369 (1975))

The Board in upholding the ALJ's Decision expressly adhered to the Board majority's opinion in Roxborough.

THE QUESTIONS PRESENTED

1. Did the Board properly exercise its responsibilities under Section 9 of the Act in granting comity to the 1964 Decision of the New York State Labor Relations Board holding appropriate a unit limited to the Petitioner's maintenance employees?
2. Was there substantial evidence, under established Board standards governing unit determinations, supporting the Board's certification of the Union as bargaining representative of the Petitioner's maintenance employees?
3. Did the Board err in expressly refusing to follow the Third Circuit's decision in Memorial Hospital of Roxborough v. NLRB 545 F.2d 351 (3d Cir. 1976)?

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POINT I

THE BOARD PROPERLY GRANTED COMITY
TO THE SLRB UNIT DETERMINATION AND
CERTIFICATION OF THE UNION

As the Board indicated in Memorial Hospital of Roxborough, it will only extend comity to the certification of the state board when its "election procedures conform to due process requirements and effectuate the policies of the Act."

Petitioner does not have the temerity to contend that it was denied due process, for as the ALJ pointed out, "in view of the repeated resort to the courts at all levels, the many hearings and detailed decisions issued herein, no contention could validly have been made." (497)

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As to whether the SLRB determination effectuates the policies and purposes of the NLRA, the ALJ concluded, after a careful statutory comparison, that "such differences as may exist between the National Labor Relations Act and the New York State Labor Relations Act do not render comity unwarranted. The statutes generally and as applied by the SLRB in this case are not inimical." (498) It should be noted that Section 705(2) of the State Act and Section 9(b) of the Federal Act are "essentially identical." (497) The provisos to both, though differently worded, "express similar concerns," (498) in that both seek to protect professional and craft employees from undesired inclusion in larger, more general units. Section

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705(2) of the State Act reads:

The board shall decide in each case whether, in order to ensure employees the full benefit of their right to self-organization, to collective bargaining, and otherwise to effectuate the policies of the article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit provided however that in any case where the majority of employees at a particular craft, or in the case of a not-for-profit making hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining.

The similarity of the foregoing to Section 9(b) of the Federal Act is fairly obvious and the intent of it is certainly the same.

Section 9(b), in pertinent part, provides:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, that the Board shall not (1) decide that any unit is appropriate for such purposes if such unit include both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation....

Petitioner points to the proviso of Section 705(2) of the State Act to support its argument that the SLRB decision does not effectuate the policies of the NLRA. This proviso appears

to require the SLRB to uphold the appropriateness of craft units and in this respect would differ from the broad discretion invested in the Board by Section 9(b) of the Federal Act. Section 9(b)(2) permits craft units to be "carved out" of pre-existing bargaining units but does not interfere with the Board's discretion in making the initial unit determination involving such units. (See Legislative History of the Labor Management Relations Act of 1947, at 418, 431, 1009.) Had the mandatory craft proviso of Section 705(2) of the State Act actually been invoked and relied upon by the SLRB, the Petitioner's argument might have some merit. However as the ALJ correctly found:

It is clear from a reading of the SLRB Decision, Order and Direction of Election (The Long Island College Hospital, 27 N.Y. SLRB 405) that the SLRB did not rely upon (and indeed was able to avoid application of) the aforementioned proviso in directing the election herein. Rather the SLRB weighed the various factors traditionally considered by it (and by the NLRB) in reaching unit determinations, including homogeneity earnings, interchange and history of collective bargaining against its policy of avoiding "over compartmentalization of hospitals into numerous small bargaining units" and found the factors to be evenly balanced. It thereupon, in a manner comparable to the NLRB in The Globe Machine and Stamping Co., 3 NLRB 294, 299-300 (1937), determined to allow the balance to be tipped by the desires of the employees." (Decision of the ALJ, p. 6)

The ALJ found that rather than invoking the mandatory craft proviso of Section 705(2) of the State Act, the SLRB had considered the standards traditionally used by the NLRB. The SLRB found weighty

considerations, both for and against, the establishment of a separate unit of maintenance employees:

On the one hand, they are a homogeneous group of skilled employees having relatively higher earnings and no interchange with the service employees, as well as a history of bargaining in, and Board decisions establishing, separate units of skilled building maintenance employees in non-hospital cases. On the other hand, there is our policy against over-compartmentalization of hospitals into numerous small bargaining units, and prior Board decisions (uncontested, to be sure) finding maintenance and service units appropriate in hospitals, as well as some history of bargaining in the hospital industry whereby the maintenance employees have been included in the same unit as the service employees. Long Island College Hospital, 27 N.Y. SLRB 405, 411 (1964)

It is important to note that the SLRB considered as a balancing factor its policy against over-fragmentation of units in the health care industry. This policy was enunciated in Wyckoff Heights Hospital, 27 SLRB No. 13. (See also Roosevelt Hospital, 27 SLRB No. 63 (1964).

The Legislative history of the health care amendments to the NLRA evinces a similar congressional concern over the dangers inherent in the undue proliferation of bargaining units in the health care industry. The reports of House and Senate contain similar admonitions:

Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in Four Seasons Nursing Center, 209 NLRB No. 50, 85 LRRM 1093 (1974), and Woodland Park Hospital, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units

enunciated in Extendicare of West Virginia,
203 NLRB No. 170, 83 LRRM 1242 (1973).
(Footnote omitted) S. Rep. No. 93-766,
93d Cong., 2d Sess. (1964) H.R. Rep No.
93-1051, 93d Cong., 2d Sess. (1974)*

In this way Congress clearly expressed its concern over the unwarranted fragmentation of bargaining units fearing that this could lead to work stoppage in this key industry and contribute to the ever-increasing rise in the cost of health care. However, it is equally clear that Congress did not intend to interfere with the discretion traditionally granted to the Board in making unit determinations. Sen. Williams, Chairman of the Senate Labor Committee and a sponsor of the version of the bill originating in the Senate (S.3203), indicated that Congress meant to set no rules for making unit determinations in the health care industry:

While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is such a history in the area or a notable disparity of interests between employees in different job classifications.

While the Committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units.
120 Cong. Rec. 22575 (July 10, 1974)

*In Four Seasons, the Board dismissed a petition for a separate unit for maintenance employees consisting of three people. The Board dismissed a petition for a separate unit of X-ray technicians in Woodland Park. And in Extendicare, the Board found a unit of service, maintenance, and technical employees to be appropriate.

Committee Chairman Thompson echoed this view in the House of Representatives:

"The committee did not intend to foreclose the Board from continuing to determine traditional craft and departmental units, such as stationary engineers in the health care field." 120 Cong. Rec. E4899 (July 22, 1974).

The Board, in making unit determinations involving groups of maintenance employees similar to the one at issue in this case, carefully considered the legislative history of the health care amendments and concluded that the above cited congressional admonition did not preclude the Board from determining that a unit of maintenance employees is an appropriate one.

Congress left the matter of the determination of appropriate units to the Board, and the desire for non-proliferation does not, in our judgment preclude our granting maintenance units in the health care areas.... Congress in fact rejected Senator Taft's suggestion that maintenance employees should always be combined with service employees into a single unit. Jewish Hospital of Cincinnati, 223 NLRB No. 91, 91 LRRM 1499, 1504 (1976) See also Duke University, 227 NLRB No. 232, 94 LRRM 1633 (1977); St. Francis Hospital, 228 NLRB No. 213, 92 LRRM 1172 (1976); Riverside Methodist Hospital, 223 NLRB No. 158, 92 LRRM 1033 (1976)

Accordingly, the Board takes the position that it will find a separate unit of maintenance employees appropriate "if an application of the Board's traditional standards, viewed against the congressional admonition against the undue proliferation of units, establishes that the employees have a sufficiently separate

community of interest to warrant such a finding." Jewish Hospital of Cincinnati, supra. The Board has found such units appropriate in several instances. See, e.g., Sinai Hospital of Detroit, 26 NLRB No. 61, 93 LRRM 1269 (1976); St. Francis Hospital, 23 NLRB No. 213, 92 LRRM 1172 (1976).

- In Sinai Hospital of Detroit, supra, as well as Riverside Methodist Hospital, 223 NLRB No. 158, 92 LRRM 1033 (1976), the Board laid out the factors it will consider in determining the appropriateness of a maintenance employees' unit:

In determining the appropriateness of a separate maintenance department unit in health care institutions, the Board applies its traditional unit criteria, i.e., mutuality of interest in wages, benefits and working conditions; commonality of skills and supervision; frequency of contact with other employees; interchange and functional integration; and area practice. It takes into account, at the same time, the congressional admonition against proliferation of bargaining units in the health care industry. Sinai Hospital of Detroit, supra at 1269.

Comparing these unit criteria with those cited by the SLRB (526-527) in its Decision, Order and Direction of Election (27 N.Y. SLRB at 411) it is apparent that the SLRB not only employed traditional NLRB standards but even considered the SLRB policy against proliferation of bargaining units in the health care industry paralleling that ultimately adopted by the NLRB.

Since Section 705(2) of the State Law is completely consistent with Section 9(b) of the Federal Law, and inasmuch as the SLRB determination as to the appropriateness of the

maintenance unit and its subsequent certification of the Union as the bargaining agent for that unit are consistent with the policies and purposes of the Act and since the Hospital was accorded due process in this entire procedure, the Board properly granted comity to the SLRB determination and certification.

POINT II

THE THIRD CIRCUIT DECISION IN ROXBOROUGH
REJECTING THE NLRB UNIT DETERMINATION AND
REFUSING TO ENFORCE THE NLRB ORDER SHOULD
NOT BE FOLLOWED

In its Long Island College Hospital Decision and Order, the Board, in affirming and adopting the ALJ's findings, conclusions, and recommended order, expressly rejected the reasoning of the Court of Appeals for the Third Circuit in Memorial Hospital of Roxborough v. N.L.R.B., 545 F.2d 351, (1976). This Board action is well-supported by policy considerations and ample precedent.

The Court, in Roxborough, contended that §9(b) "requires the Board to exercise its discretion as to an appropriate unit in each and every case." [emphasis added] (545 F.2d at 360.) Section 9(b) of the Act which provides that "The Board shall decide in each case" what the appropriate bargaining unit shall be. In narrowly construing this statutory language as precluding any delegation of this responsibility the court relied heavily upon LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949). However, we submit LaCrosse can be readily distinguished.

LaCrosse involved a state board unit determination and certification where the employer was subject to NLRB jurisdiction. Neither Roxborough nor Long Island College Hospital were "employers" under the Act at the time the state board determinations were made.

While LaCrosse Telephone may be read to preempt all unit determinations by state boards when the NLRB has jurisdiction, it certainly does not support the contention that the Board, after obtaining jurisdiction, must redetermine the appropriateness of every unit which the state boards found appropriate at a time when those agencies had sole jurisdiction.

Furthermore such a reading of §9(b) is inconsistent with long established Board precedent. See e.g., Bluefield Produce and Provision Co., 117 NLRB No. 215, 40 LRRM 1065 (1957); West Indian Co. Ltd, 129 NLRB No. 143, 47 LRRM 1146 (1961); and Screen Print Corp., 151 NLRB No. 119, 58 LRRM 1641 (1965). The foregoing decisions were cited by the Board in granting comity to the unit determination of the state board in Roxborough. While the Third Circuit accurately noted that, on these challenges to the Boards certification of bargaining agents, the appropriateness of the units was uncontested, this attempt to distinguish these decisions misses their point. What was important in these cases is that they promulgated the Board's policy of comity and set forth the conditions under which comity would be granted.

In Bluefield the Board declared that it would give the same effect "to certifications based upon secret ballot elections conducted under the auspices of responsible state government agencies as to Board certifications." (40 LRRM at 1066). It is difficult to reconcile a reading of the Act as compelling the Board to redetermine the appropriateness of the state board's bargaining

unit determination while at the same time permitting the Board to grant comity to its certification of the bargaining agent.

In Otis Hospital Inc., 219 NLRB No. 55, 89 LRRM 1545 (1975) where the Board was faced with a stipulation for consent election designating units not in conformity with Board determinations made in contested cases, it determined that "in the health care industry, we will give affect to all stipulations designating unit compositions that do not contravene the provisions or purposes of the Act or well-settled Board policies." This decision surely is not in keeping with the Third Circuit's interpretation of §9(b).

Petitioner cites Evinrude Motors Division of Outboard Marine and Mfg. Co., 66 NLRB 1142, 17 LRRM 405 (1946), and Wilson-Hurd Mfg. Co., 68 NLRB 853 18 LRRM 1172 (1946) as examples of the Board refusal to grant comity when the appropriateness of the unit is contested. However as the ALJ has already noted these cases are inapposite:

In those cases the key factor was the State agency's lack of discretion in regard to the conduct of a separate craft election. In the instant case, the SLRB's direction of a self-determination election in the maintenance and engineering department was entirely an exercise of its reasoned discretion. That discretion was exercised only after general and specific hearings were held by the SLRB on the unit question. See College Hospital No. II, *supra*, 85 LRRM at 2582. Additionally, in both Evinrude and Wilson-Hurd, the State agency had directed craft elections after petitions for same had been dismissed by National Labor Relations Board Regional Directors, at times when the NLRB had jurisdiction, and

in the face of existing and viable collective-bargaining relationships on broader bases. (491)

It is thus clear that the narrow construction of Section 9(b) urged by the Third Circuit is not only inconsistent with Board precedent but would mandate that the Board perform the task of redetermining every unit determination that was made in any manner except pursuant to the Board's own investigation. We submit that such a redetermination should only be required where the state board's determination fails to comport with due process or to effectuate the purposes of the Act. Since this is not the case here, such redetermination should not be compelled.

The majority opinion of the Third Circuit in Roxborough also argues that the 1974 Legislative history of the Health Care amendments bars comity. As examination of that history has shown, the congressional policy against undue proliferation of bargaining units is a factor that must be considered in unit determinations in the health care industry. However, as has been noted, the SLRB adhered to a similar no proliferation policy in 1964 and considered this factor in making its unit determination. Thus, the congressional admonition that this factor be considered has been satisfied and no valid argument can be made that legislative history bars comity in this case.

Finally, there are serious policy considerations that here militate in favor of the extension of comity. Petitioner in this case is patently invoking the NLRA's review procedures as yet another device for denying its maintenance employees

their right to bargain collectively through representatives of their choosing. While the issue of the appropriateness of the unit in question has been exhaustively litigated, those employees have already been denied representation for 13 long years. To allow the Petitioner to succeed in this suit would be further to encourage employers to delay and ignore their obligation to bargain in the hope that a change in the law or the unit composition might enable them to relitigate the issues yet again. This would be in direct conflict with the purpose of the Act (Section 1) which is to encourage collective bargain and thereby avoid the interruptions in the flow of interstate commerce caused by labor disputes. To uphold this petition would open the "floodgates" to demands by all those employers bargaining with regard to units not directly determined by the Board for a redetermination of the scope of the units. This would not only result in an onerous administrative burden but would also tend to encourage employers to refuse to bargain.

The Board, acutely aware of the foregoing considerations, grants comity to state board decisions that are both consistent with the Act and with due process requirements. This approach is consistent with Boards long established policy of deferring issues underlying unfair labor practice charges to arbitration. This management of the Board's time and resources has been held to be supportive of the purposes and policies of the Act. Associated Press v. NLRB, 492 F.2d 662, (D.C. Cir., 1974).

Thus it is submitted that both policy and precedent militate against following the opinion of the Third Circuit in Roxborough.

POINT III

NO SPECIAL CIRCUMSTANCES ARE HERE PRESENTED THAT WARRANT RELITIGATION OF THE UNIT ISSUE

The Board, in Memorial Hospital of Roxborough, supra, reiterated its well settled rule "that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) of the Act is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding." Petitioner does not contend that there is any newly discovered or previously unavailable evidence but does assert that special circumstances exist which warrant relitigation of the unit determination. Petitioner cites, as such special circumstances, (1) the lapse of time since certification of the Union; (2) changes in the composition of the unit; and (3) changes in the operations of the Hospital. The ALJ considered Petitioner's contentions and rejected all three.

1. THE LAPSE OF TIME

On the lapse of time issue, Petitioner contends the Union's responsibility for the lapse of time between the certification and the commencement of bargaining is a special circumstance. As previously noted, the Court of Appeals held in College Hospital No. I, supra, that the Union had initially chosen the wrong procedure for challenging Petitioner's refusal

to bargain. Almost 4 years were lost in the process. Of course it goes without saying that the need for this litigation would have been obviated had the Petitioner chosen to bargain with the Union in good faith. Moreover, as the New York Court of Appeals stated in College Hospital, No. II, supra:

"There is no basis whatever for criticism of the Union for its asserted delay in failing to file an unfair Labor practice complaint.... As our court unequivocally stated in the Roosevelt Hospital case... 'Delays occasioned by the union's exercise of what it reasonably believed to be its right under the statute [to invoke the mediation, factfinding and compulsory arbitration proceedings of Section 716] did not call for a redetermination of its status as a representative any more than would delays resulting from the slowness of administrative action or from the employer's pursuit of his judicial remedies in seeking court review of the board's certification.' 32 NY2d 314 at 329.

The ALJ in rejecting the Hospital's complaints of untoward delay noted:

"More time has passed since the Union filed its unfair labor practice charge than was spent prior thereto in pursuing what it then deemed to be an appropriate means for resolving the issues and bringing [Petitioner] to the bargaining table." (494)

Petitioner's contention that the mere passage of time is a sufficient special circumstance to warrant relitigation is simply without merit for as, the ALJ held:

"To entertain such a defense would produce the anomalous result of permitting a Respondent to benefit from a lapse of time resulting from litigation for which it was responsible by virtue of its unlawful refusal to bargain." Holly Farms Poultry Industries, 189 NLRB 663

(1971; Spitzer-Acron Inc., 211 NLRB 114
(1972: 7494)

Petitioner also contended that the SLRB certification expired on March 4, 1975 - one year after the Supreme Court's refusal to review forced Petitioner to the bargaining table - so there was no longer an effective SLRB order to give comity to. The ALJ in dismissing this contention stated that Petitioner had

"misconceived the nature of a certification of representation. Certification is not a license which, upon the mere passage of time, expires as if it were a license to operate a motor vehicle. Rather, certification is a key which opens a collective bargaining relationship. That relationship remains viable until some material circumstance arises to place the continued existence of that relationship in question. The passage of time, alone, is, as noted, not such a material circumstance. See, for example, Ray Brooks v. NLRB, 348 U.S. 96, 98 (1954); King Radio Corporation, 208 NLRB 578 (1974), enf'd 510 F.2d 1154 (C.A. 10, 1975); Laystrom Manufacturing Co., 151 NLRB 1482, 1483 (1965)." (495)

2. THE ALLEGED CHANGES IN UNIT COMPOSITION

Petitioner contended that changes in the unit composition constituted special circumstance which warrants relitigation of the unit question. In rejecting this contention, the ALJ cited Laystrom Manufacturing Co., 151 NLRB 1482, 1484 (1965) wherein the Board held that:

"Employee turnover standing alone does not provide a reasonable basis for believing that the Union had lost its majority since the prior election. The Board has long since held that new employees will be presumed to support a union in the same ratio as those whom they have replaced." (495)

The ALJ also relied upon Washington Manor Nursing Home (South), 211 NLRB 324 (1974), both enforced, NLRB v. Washington Manor, Inc., 519 F.2d 750, 89 LRRM 3044 (C.A. 6, 1975), which hold that, even after the expiration of the certification year, a certified union is entitled to a rebuttable presumption of majority status. The ALJ having found no evidence, beyond mere employee turnover, to rebut this presumption, concluded that the changes in unit composition did not constitute special circumstances warranting a relitigation of the unit determination(495).

3. THE ALLEGED CHANGES IN OPERATIONS

With regard to Petitioner's contention that changes in its operations warrant a redetermination of the unit question, the record reveals that, in the past thirteen years, Petitioner has built or acquired new buildings, moved from older to newer buildings, modernized some equipment, and made certain other improvements. However, all the buildings remain in the same geographical area. The ALJ held that these cosmetic changes do not constitute a special circumstance:

As part of a departmental "reorganization" around 1969 (prior to enforcement of the SLRB's order to bargain), specific job titles for many of the maintenance and engineering department employees were eliminated. The work, responsibilities and contact with employees of other departments, of the maintenance-engineering employees remained unchanged, however, and a number of the employees have continued to this day to perform such specialized and skilled functions

as plumber, electrician and refrigeration mechanic. At the same time, new supervisory positions within the department were created, assigning responsibility for particular maintenance tasks to lower level supervisors. These supervisors continue to report to a Director of Engineering who has overall supervision and responsibility for the maintenance and engineering department. Such changes do not materially affect the community of interest of the maintenance and engineering department employees. See Rittling Corporation, 203 NLRB 355 (1973). (496)

Thus, the ALJ rejected all of Petitioner's contentions that a special circumstance exists which warrants relitigation of the unit determination. The ALJ's conclusions were based upon substantial evidence in the record before him and ample Board precedents. Since no special circumstance was shown that would have made relitigation of the unit issue appropriate, comity was properly granted to the SLRB unit determination and representative certification.

CONCLUSION

For all of the reasons hereinabove set forth the petition should be in all respects dismissed and the Board's application to enforce should be in all respects granted.

Respectfully submitted,

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July 29, 1977

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Clerk, United States Court of
Appeals for the Sixth Circuit
Foley Square
New York, New York

Re: The Long Island College Hospital, Petitioner
v. National Labor Relations Board, Respondent
Appeal No. 77-4083

Dear Mr. Fusaro:

Enclosed herewith for filing are 10 copies of Respondent-
Intervenor's Brief in this matter.

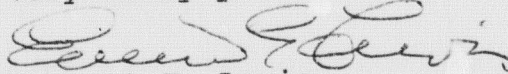
This will certify that this date I have served two copies
of the Respondent-Intervenor's Brief by mailing the same by
first class post paid certified mail, return receipt requested,
addressed as follows:

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